IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.2.2006

CORAM

THE HON'BLE MRS.JUSTICE PRABHA SRIDEVAN

S.A.NOS.872,873 OF 1995 AND 97 AND 997 OF 1996

Ganga Reddiar ...Applnt in SA.872 & 873/95/
1st Defendant

E.Narayanasamy ...Applnt in SA.97 and 997/96/
2nd defendant Plaintiff in 997/1996

Vs.

Shanthammal
Kammalamppondi Village
and Post,
(via), Uthiramerur ...1st respdt. In SA.Nos.872/95,97 & 997/96 & 2nd respdt. In SA.873/96/ Plaintiff 2nd defendant

E.Narayanasamy
Melavalampettai Village,
Karunguzhi Post,
Maduranthagam Taluk. ...2nd respdt in SA.872/95 & 1st respdt in SA.873/95/ Plaintiff in 873/95

Sumathi
Kodiyalam Village
and post'
Vandavasi Taluk. ...3rd respdt. in SA.873/95 and 997/1996/ 3rd defendant in 873/95

Ganga Reddiar
S/o Doraisamy
Sakkankollai Vellaputhur
Madurantakam Taluk
Chengai MGR District. ...2nd respdt. In S.A.Nos.97 and 997/1996 /defendants

S.A.NOS.872,873/95 & 97 and 997/96: These second appeals are filed against the decree and Judgment dated 24.1.1995 passed in A.S.Nos.1 & 18 of 1994 on the file of the District Judge, Chingleput, confirming the degree and Judgment dated 15.10.1993 passed in O.S.Nos.139 of 1992 and 33 of 1987 on the file of the Sub Court, Kancheepuram.

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For appellant in S.A.NOS.872 and 873 of 1995 and 2nd respdt. In S.A.Nos.97 and 997/1996 : MR.J.R.K.Bavanantham

1st respdt. In SA.Nos.872/95,97 & 997/96 & 2nd respdt. In SA.873/96 : Mr.S.Viswanathan

2nd respdt in SA.872/95 & 1st respdt in SA.873/95

1st respdt. In SA.Nos.872/95,97 & 997/96 & 2nd respdt. In SA.873/96 : Mr.Y.K.Rajagopal

3rd respdt. in SA.873/95 and 997/1996 : NDW

J U D G M E N T

The lower appellate Court has reversed the judgment of trial Court and arrived at conclusion clearly unsupported by pleadings and evidence.

2. These four appeals arise out of two suits. O.S.No.33 of 1987 was filed for specific performance. The reference to the parties in these appeals will be as per their ranks in this suit. The second defendant filed O.S.No.139 of 1992 for injunction against the plaintiff and the first defendant.

3. According to the plaintiff, the first defendant is the absolute owner of the suit properties. He mortgaged the properties to the plaintiff on 10.3.1983 under Ex.A1., after receiving a loan of Rs.25,000/- to be repaid with interest at 12% p.a. According to him, after mortgage, the possession of the properties were also handed over to the plaintiff. Subsequently, the plaintiff and the first defendant entered into a sale agreement on 23.8.1983 under Ex.A2 and the sale consideration was fixed at Rs.30,000/-. The mortgage amount of Rs.25,000./- was treated as advance. Under the sale agreement, the first defendant had confirmed the possession of the plaintiff with respect to the suit properties and the original title deeds were also handed over to the plaintiff. Four year period was fixed for payment of the balance of Rs.5,000/-. The plaintiff pleaded readiness and willingness to pay the said amount. However, the first defendant was postponing to perform his part of contract.

4. On 11.7.1985, the first defendant had executed a sale deed Ex. B.4, in favour of defendants 2 and 3 in respect of the same property, the consideration was Rs.19,010/-. According to the

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plaintiff, the suit properties are always with him. The sale deed dated 11.7.1985 is not binding on him. The second defendant filed O.S.No.1014 of 1986 before the District Munsif, Kancheepuram against the plaintiff and the first defendant for permanent injunction and in I.A.No.1406 of 1986 in O.S.No.1014 of 1986, temporary injunction was also obtained and subsequently, the plaintiff filed I.A.No.99 of 1987 to vacate the injunction and the injunction was vacated. Since the first defendant refused to perform his contract, the suit was filed.

5. The first defendant admitted the execution of the mortgage deed EX.A1 and also that the plaintiff was put in possession by means of a Varthamanam letter. According to him, thereafter since the plaintiff could not cultivate the lands, the defendant took back the possession. The agreement (Ex.A2) dated 23.8.1983 is alleged to have been obtained by misrepresentation, undue influence and fraud. According to him, this agreement was taken in order to defeat the claim of second defendant and her husband. According to him, even the documents executed in favour second and third defendants are not supported by consideration. According to the first defendant, the plaintiff obtained several signatures in stamp papers and they were used by him. However, it is admitted in the written statement that the original documents were handed over to the plaintiff. But, according to the first defendant, they were handed over to the plaintiff at the time of mortgage deed , but not at the time of execution of the sale agreement.

6. The second defendant filed a written statement in which the handing over of possession is denied and also the readiness and willingness of the plaintiff. The second defendant also denied the sale deed dated 11.7.1985 Ex.B.4, which was obtained by collusion. According to the second defendant, there was no cause of action against the second defendant and therefore, the suit may be dismissed as against the second defendant.

7. The trial Court on consideration of the oral and documentary evidence, decreed the suit and dismissed the suit for specific performance (O.S.No.33 of 1987) filed by the second defendant for permanent injunction (O.S.No.139 of 1992). A.S.No.1/94 was filed by the plaintiff against the judgment and decree passed in O.S.No.139/92, A.S.No. 2 of 1994 was filed by the second defendant against the judgment and decree passed in O.S.No.33 of 1987 and A..S.No.18/1994 was filed by the first defendant against the decree in O.S.No.33 of 1986. The first Appellate Court allowed A.S.Nos.1 and 2 of 1994 thereby setting aside the judgment and decree for specific performance and dismissed the appeal filed by the second defendant against the dismissal of O.S.No.139 of 1982. Against these appeals, four second appeals have been filed.

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8. While admitting the second appeal in S.A.No.97 of 1996, this Court framed the following Substantial question of law :

> "Whether the lower appellate court erred in law in holding that the sale deed in favour of the plaintiff is a true and valid document without considering whether the sale deed was supported by consideration and that the purchaser was a bonafide purchaser for value without notice of the sale agreement"

9. While admitting the second appeals in S.A.Nos 872 and 873 of 1996, this Court framed the following Substantial question of law :

> "Whether in the absence of evidence establishing possession of the suit properties, the first respondent, plaintiff would be entitled to permanent injunction?"

10. While admitting the second appeal in S.A.No.997 of 1996,, this Court framed the following Substantial question of law :

> "When the 1st defendant has not proved that Ex.A2 was obtained under collusion and undue influence, whether the lower appellate court erred in not holding that Ex.A2 is a true and valid document?"

11. As regards the suit agreement, Ex.A2, the first defendant has agreed in his written statement and in the oral evidence that he has signed the document. But, however, it is his case that his signature was obtained from him by fraud, undue influence and coercion.

12. Learned counsel for the plaintiff has produced a xerox copy of the stamp paper on which this document had been written and it is seen that the stamp paper has been obtained in the name of the first defendant viz. Ganga Reddiar. In his evidence as DW1 he has stated about Ex.A2 in his Chief examination , which reads as follows:

> **வா.சா.ஆ.2. கிரயப்பத்திரம் மேற்படி ஒப்பந்தத்தை 2, 3 வது பிரதிவாதிகள் வழக்கு போடுவதற்கு முன்ப, எழுதிக்கொடுத்தேன். வா.சா.ஆ.2 ல் சாட்சி கையெழுத்து செய்த சுப்ப,ராயன் வாதியின் குமாஸ்தா. காஞ்சிப,ரத்தில் வா.சா.ஆ.2. எழுதப்பட்டது. 23.8.83**

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ல் வாதியின் மில்லில் உட்கார்ந்து வா.சா.ஆ.2. எழுதப்பட்டது என்றால் அது தவறு.

13. There is nothing in his chief examination to show that Ex.A2 was obtained by undue influence, fraud and coercion; on the other hand, his evidence is that Ex.B19 was obtained from him by threat. The cross examination does not improve his case. There is absolutely nothing in his evidence to prove fraud, coercion and undue influence. In his re-examination, he admits that he has purchased the stamp papers for Ex.A2. Nothing has been elicited in the cross examination of P.W.s 2, 3 and 4 to show that Ex.A2 is not true or that there was fraud and undue influence. The trial court found that there was no reason to disbelieve the evidence of P.Ws. 2 to 4. As regards the date of handing over possession of the title deeds, the case of the first defendant is that they were handed over to the plaintiff only on the date of execution of mortgage deed and not on the date of the agreement. The trial Court, found that since the mortgage is only a simple mortgage, there was no necessity to hand over the title deeds on that date and there are no recitals in Ex.A1 to that effect, whereas the circumstances show that the title deeds were handed over only at the time of Ex.A2. Exs.A3 to A5 are the parent title deeds. Though the first defendant would plead that after handing over possession of the property to the plaintiff at the time of execution of the mortgage deed, the plaintiff pleaded his inability to cultivate the property and the first defendant regained possession of the property, apart from these pleading that there is no proof. The plaintiff has clearly stated that he has been always ready and willing to pay a sum of Rs.5,000/- and in spite of calling upon the first defendant to execute the sale deed, the first defendant refused to do so and that is why the suit was filed. Even in his evidence, he has stated that as follows:

கிரயப் பாக்கித் தொகை ரூ. 5000/ செலுத்த தயாராக உள்ளேன்.

This has not been attacked in the cross examination. In these circumstances, the conclusion of the trial Court that the sale agreement is genuine and the plaintiff has proved his readiness and willingness, cannot be found fault with. The appellate Court, on the other hand, has examined the oral evidence with a microscopic eye and all the minor discrepancies have been highlighted. Even the date on which the foundation of the mill building was laid has been taken note of for disbelieving Ex.A2. The appellate Court for some reasons, has come to the conclusion that the agreement must have been executed in 1986, which is not even the first defendant's case. According to the appellate Court, the inconsistent evidence regarding the place of the execution of the agreement shows, it has been got up for the purpose of suit.

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This is not the case of the first defendant. The appellate Court has also rejected Ex.A.2 because, no reason was given for fixing four years for the performance of the contract, when only Rs.5,000/- was the balance amount to be paid. This again is not the pleading of the first defendant. Therefore, the conclusion drawn by the appellate Court that the agreement must be disbelieved for this reason is totally unsustainable. As regards the possession, the appellate Court disbelieves it. There is no justification since the first defendant in the written statement has categorically admitted that on the date of mortgage deed, the possession was handed over to the plaintiff . It is the defendants' case that because the plaintiff had found that he could not cultivate the properties, the first defendant took back the possession. If this is so, it is for the first defendant to prove it. When the first defendant himself admits that possession was handed over to the plaintiff and it is confirmed by the recitals in subsequent document, the appellate Court grievously erred in concluding that the possession could not have been handed over to the plaintiff. The conclusion of the appellate Court in this regard is totally unsustainable. Pleas of coercion, fraud etc. must be proved. Therefore, the substantial question of law raised by this Court with regard to the absence of proof of collusion coercion and undue influence must be answered in favour of the appellant.

14. Now we will consider the substantial question of law relating to defendants 2 and 3, being the bonafide purchasers for value, without notice of the sale agreement. The second defendant in her written statement has merely alleged that the sale agreement is obtained by coercion on old stamp papers and that it is only a make believe affair that she is the bonafide purchaser for value. It is clear from the evidence of DW1, the husband of the second defendant that he was aware of the mortgage in favour of the plaintiff, since he says that before the sale deed, he went and met the plaintiff along with one Jayavarthanam. In the cross examination, he totally retracts from the statement and says that he did not know about the mortgage deed. He says that he did not see the Encumbrance Certificate and he trusted the first defendant. A specific question has been put to this witness regarding the due diligence that a reasonable purchaser would show while purchasing the property. A question was also asked regarding the parent title deeds and he stated as follows:

மூலப்பத்திரங்களை வா.சா.ஆ.1. முன்னிலைக்கு வாதி வசம் ஒப்படைக்கப்பட்டது என்றால் அது தவறு. அவற்றை ஒப்படைக்குமாறு முதல் பிரதிவாதிக்கு அறிவிப்பு, நான் அனுப்பவில்லை. அதற்கு காரணம் இல்லை. முதல் பிரதிவாதிக்கு

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கிரயம் மூலமாக பாத்தியப்பட்டது என்று நான் தெரிந்து கொண்டேன்.

15. A suggestion has also been put to this witness that the sale deeds have been brought about in the name of his wife and her sister to defeat the right of the plaintiff. The evidence of this witness does not show that the purchase has been bonafide, without notice of the prior agreement. The appellate Court bye-passed this issue by saying that only if the agreement is proved, then alone the question of bonafide purchaser for value would arise. The appellate Court's conclusion regarding the agreement has already been found to be incorrect. Therefore, this substantial question of law also answered in favour of the plaintiff.

16. As regards the suit for injunction, the suit was filed in 1986, but re-numbered in 1992. Learned counsel for the first defendant would submit that the plaintiff has lost possession and therefore he has come to the Court with unclean hands alleging that he is in possession when he is not in possession. Therefore, he is not entitled to either of the equitable remedies of specific performance or of injunction. It is true that in the plaint, it is stated that he is in possession. It is supported by the written statement filed by the first defendant, whereas in his evidence, he has stated that only in 1986, the date on which the suit was filed, he was in possession and thereafter the second defendant wrested possession from him. Therefore, the question of coming to Court with unclean hands does not arise. That he was in possession on the date of suit stand proved. It is not only his pleading, but it is supported by first defendant's pleading. First defendant is the owner of the suit property and he has clearly admitted in the varthamanam letter regarding handing over of possession. The misappreciation of the pleadings and evidence has given rise to this substantial question of law.

17. For the reasons given in para 14 supra the question regarding bonafide purchase is answered in favour of the plaintiff.

18. For the reasons given in para 11 and 12 supra, the question regarding fraud, coercion and collusion are answered in favour of the plaintiff.

19. For the reasons given in para 15 supra, the question regarding possession is answered in favour of the plaintiff.

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20. The suit filed by the second defendant for bare injunction must also fail. S.A.Nos.97 and 997 of 1996 are allowed restoring the judgment and decree of the trial court in O.S.No.33 of 1987 and O.S.No.139 of 1992.

21. For the above reasons, S.A.Nos.872 and 873 of 1995 are disposed of restoring the judgment and decree of the trial Court in O.S.No.33 of 1987 and O.S.No.139 of 1992. Learned counsel for defendants 2 and 3 submits that defendants 2 and 3 have settled the matter with the first defendant. This is recorded. No Costs.

VJY

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The District Judge, Chingleput.

2. The Sub Judge, Kancheepuram.

+ 4 ccs to Mr.S. Viswanathan, Advocate SR No.6951

+ 4 ccs to Mr.P.B. Ramanujam, Advocate SR No.6925 to 6928

TEJ(CO)
SR/10.4.2006

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AND 97 AND 997 OF 1996

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